BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NEIL E. CARES Claimant VS. **FRITO LAY** Respondent AND **LIBERTY MUTUAL INS. CO.** Insurance Carrier	)	Docket No. 1,001,693

ORDER

Respondent and its insurance carrier (respondent) requested review of the July 24, 2006, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent. The ALJ did not identify a specific accident date. Nevertheless, the ALJ also found that notice was given within ten days of the accident and that written claim was timely. Accordingly, the ALJ ordered temporary total disability compensation be paid to claimant by respondent from November 5, 2005, until further order, until claimant is certified as having reached maximum medical improvement (MMI), until claimant is released to a regular job, or until claimant returns to gainful employment, whichever occurs first. The ALJ also ordered medical treatment paid by respondent on claimant's behalf with Dr. Michael McCoy until further order or until claimant is certified as having reached MMI.

Respondent notes that the ALJ's Order for Compensation states this case came on for hearing on July 21, 2006. Respondent states that respondent did not receive notice of a hearing held on July 21, 2006. Respondent further states that neither claimant nor his attorney appeared at a hearing on July 21, 2006. Respondent argues that it was denied due process and requests it be given an opportunity to present evidence in this matter. Respondent also contends claimant failed to prove that he met with personal injury by

accident on the date or dates alleged, failed to prove his alleged injury arose out of and in the course of his employment with respondent, failed to give adequate notice of his injury to respondent within ten days, and failed to file a timely written claim. Respondent requests, therefore, that the Board issue an order denying compensation.

Claimant argues that the July 24, 2006, order was issued as a result of the January 26, 2006, and March 2, 2006, hearings. Claimant also contends that the issues raised by respondent are not appealable from a preliminary hearing. Claimant, therefore, requests that the Order for Compensation entered on July 24, 2006, be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in 1976 as a machine operator, which required him to load film on a machine, weigh bags of product, and make sure there were coupons in the bags when needed. Physically, he was required to pick up about 20 rolls of film a day, place them on a cart, and unload the cart to physically put the film in the machine. If coupons were inserted in the bag, he was required to climb stairs to a second tier to work on the coupon machine. At times, he was required to climb stairs to the third tier to inspect and clean the area where the chips rotated. He testified that some days he would climb the stairs all day; other days it would not be that bad. He estimated that he had to climb stairs from 20 to 50 times a day.

Claimant started noticing pain in his back, hips, and legs. Claimant testified that in January 2002, he told Jeff Wineinger, respondent's safety director, about his injuries. The accident report filled out by Mr. Wineinger, which is dated January 25, 2002, indicates that claimant "stated he is suffering from pain in his rt. hip and lower back. Cause of injury is unknown, no other specifics given. [Claimant] has complained of this pain for over the past year and has been seeing a personal physician for this pain."[1] Respondent claims this notice was insufficient as it failed to state the time, place, and particulars of claimant's injury. Respondent also argues that claimant alleges his work wore him down over time and that claimant should have formally reported his pain as it progressed; therefore, claimant failed to file a timely written claim.

Claimant testified that he was injured at work by the wear and tear of going up and down stairs so many times and working on the hard concrete floors for so many years. He stated that the floors were greasy and slick and he had to walk on them using a different gait than on a normal floor to prevent a fall. Claimant also stated that the lifting he was

[1] P.H. Trans. (Mar. 2, 2006), Cl. Ex. 2.

required to do had an impact on his hips. He testified that he started noticing symptoms in his hip about a year before he stopped working. His last day working at respondent was January 8, 2002. Claimant admitted that he was overweight and stated that his weight fluctuated from 270 pounds to a high of 288 pounds.

Two of claimant's daughter's testified that when claimant returned home from working at respondent, he would complain that his legs and hips hurt. It was hard for him to get up stairs. His daughters had to take off his shoes and socks for him.

Claimant saw Dr. Michael McCoy, a board certified orthopedic surgeon, for treatment of his hips. Dr. McCoy diagnosed claimant with osteoarthritis of both hips, worse on the right than the left. Claimant's right hip was replaced by Dr. McCoy in November 2005. Claimant said that the cost of that hip replacement was covered by either Social Security or Medicare.

Claimant stated his right hip replacement was delayed because he was told by Dr. McCoy to wait until his pain got to the point he could not stand it before having a hip replacement. He stated that his right hip replacement was also delayed because of an unrelated heart condition and because of insurance problems. Claimant admitted that his pain was substantially worse in November 2005, when he had the right hip replacement, than it was in January 2002, when he last worked at respondent.

Dr. McCoy testified that osteoarthritis is "just a wearing away just like the tread on your tire wears away as you drive the car."[2] Dr. McCoy stated that claimant was obviously overweight and that he was sure claimant's weight contributed to the development of his osteoarthritis. He also testified that the osteoarthritis in claimant's hips is an age-related condition.

When asked if lifting up to 70 pounds would put stress on claimant's hips, Dr. McCoy testified that the lifting would put stress on his back. However, if claimant was required to walk a distance with the weight, it would put stress on his hips. He also stated that if claimant had to climb up and down stairs up to 30 times a day carrying weights of 30 pounds, it would aggravate or exacerbate his osteoarthritis. He stated further:

> Doing just anything is going to–you know, going to church, you know, is going to do it. Doing stairs at home. Just activities of daily living. If he was having to carry hay bales or 100-pound feed sacks at a co-op, you know, back and forth across the floor, I would be a lot more worried about that than a few times up and down the stairs that he did. The 100 extra pounds he carries on his own really kind of dwarfs the rest of it.[3]

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[2] McCoy Depo. at 5.

[3] *Id.* at 11-12.

Dr. McCoy testified that claimant will need to have his left hip replaced sometime in the future.

At the request of claimant's attorney, claimant was seen by Dr. Edward Prostic, a board certified orthopedic surgeon, on March 8, 2004. Dr. Prostic found that claimant sustained repetitious minor trauma to his lumbar spine and hips during the course of his employment. Dr. Prostic diagnosed claimant with severe osteoarthritis of his hips. He also stated that claimant's symptoms are "highly suggestive of lumbar spinal stenosis to which he is predisposed by his short lumbar pedicles."[4] Dr. Prostic testified that claimant would not be employable until he has a successful hip replacement. Dr. Prostic opined that claimant's excessive weight would not have accelerated his osteoarthritis, but the weight he lifted at work would have caused acceleration of the hip disease.

After the preliminary hearing of January 26, 2006, the ALJ ordered that claimant be seen by Dr. Joseph Huston for an independent medical evaluation (IME). Dr. Huston saw claimant on July 14, 2006. Dr. Huston's report states:

> I think his arthritis is the product of ordinary wear and tear and aging and his heavy weight. His job activities, in my opinion, have not been the cause in any way of his hip arthritis. The job activities, however, were an aggravating factor in relation to his hip symptoms due to arthritis. I cannot say that the job activities actually caused the arthritis of the joint to accelerate or be made worse but the job activities would be aggravating to the joint symptoms.[5]

1. *Whether a hearing was held on July 21, 2006, and if so, whether respondent was denied due process for failure to receive notice of such hearing.*

The Board finds respondent was not denied due process for failure to receive notice of a July 21, 2006, hearing because there was no hearing held on July 21, 2006. Rather, the ALJ was apparently referring to his receipt and review of the court-ordered IME report by Dr. Huston. As such, the ALJ's July 24, 2006, Order for Compensation was the result of a continuation of the January 26, 2006, and March 2, 2006, preliminary hearings. Respondent acknowledges in its brief that a preliminary hearing was held on January 26, 2006, which resulted in a continuance until Dr. McCoy's deposition could be taken. And another preliminary hearing was held on March 2, 2006, which resulted in the ALJ ordering claimant to be examined by a neutral physician. Respondent neither requested that the record be held open for additional evidence, nor did respondent request an opportunity to take the deposition of Dr. Huston after his report was received. To the contrary, counsel for respondent represented at the March 2, 2006, hearing that he had no additional

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[4] Prostic Depo., Ex. 2 at 2.

[5] IME report of Dr. Joseph Huston dated July 14, 2006, filed July 21, 2006, at 3.

evidence to present. Accordingly, both claimant and respondent should have expected the ALJ to rule on claimant's request for preliminary benefits following the ALJ's receipt of Dr. Huston's IME report. This is precisely what the ALJ did by his order dated July 24, 2006. Respondent was not denied due process of law, and the ALJ did not violate the mandates of K.S.A. 44-534a. Claimant, in his brief to the Board, lists the record on appeal as containing all of the hearings, deposition transcripts, and exhibits respondent seeks to have included. All of the evidence that respondent lists in its brief as being what it would have offered had it been given the opportunity to do so is, in fact, the record that the ALJ considered and is part of the record being considered by the Board in this appeal. Should respondent have additional evidence it now desires to present to the ALJ, it can request another preliminary hearing or, if claimant has reached MMI, a regular hearing.

2. *Whether claimant filed a timely written claim.*

K.S.A. 44-520a requires that a written claim for compensation be served upon the employer within 200 days after the date of accident. Claimant's Form K-WC E-1 Application for Hearing, dated January 16, 2002, was filed with the Division of Workers Compensation on January 22, 2002. It alleges a "series of accidents on or about January 3, 2002 to present." Claimant last worked for respondent on January 8, 2002. A copy of this Application for Hearing was mailed to both respondent and its insurance carrier by the Division on February 4, 2002. Accordingly, written claim was timely made.

3. *Whether claimant suffered personal injuries by a series of accidents that arose out of and in the course of his employment with respondent.*

Respondent argues that claimant's injury did not "arise out of" his employment because his injury was preexisting and any aggravation occurred as a result of the natural aging process or by doing normal activities of day-to-day living.[6]

The phrases "arising out of" and "in the course of"

> have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. [Citation omitted.][7]

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[6] See K.S.A. 2005 Supp. 44-508(e).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P.2d 837 (1984).

The Kansas Supreme Court has held that there are three general categories of risks in workers compensation cases: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment or personal character.[8] Only those risks falling in the first category are universally compensable; personal risks do not rise out of the employment and are not compensable.[9] Three cases that are illustrative of these three categories of risks in the context of "personal injury" as defined by K.S.A. 44-508(e) and their interplay with aggravations of preexisting conditions, the natural aging process, and normal activities of day-to-day living, are *Martin*[10], *Boeckmann*,[11] and *Anderson*.[12]

The claimant in *Martin* was a custodian at a public school who suffered from a long history of back problems. Upon arriving at the parking lot of the school, Martin attempted to get out of his vehicle but twisted his back. The court denied compensation, concluding that the risk involved in Martin's accident was not associated with his employment and there were no intervening or contributing causes for the accident. Rather, the risk was personal to Martin. The fact that Martin's back problems could be aggravated by almost any everyday activity bolstered the court's conclusion that his injury was the result of a personal risk.[13]

The claimant in *Boeckmann* was an inspector of truck and tractor tires who suffered from degenerative arthritis of his hips. He underwent an operation on his left hip, but within three years the pain in his right hip began to worsen. Three weeks before his injury, Boeckmann was lying on a conveyor belt. As he got up, he felt a pain in his back. Boeckmann was not able to work for three days. The day of his injury, Boeckmann stooped down to pick up a tire and injured his back. The court denied compensation, finding that Boeckmann's everyday bodily motions required at work gradually and imperceptibly eroded the physical fibers of his structure. The court further found that any movement would aggravate Boeckmann's condition, regardless of whether the activity took

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[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[9] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[10] *Id.*

[11] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[12] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[13] *Martin*, 5 Kan. App. 2d at 300.

place on or off the job.[14] The Board has described the 1993 amendments to K.S.A. 44-508(e) as a codification of *Boeckmann*.[15]

The claimant in *Anderson* installed convertible tops, headliners, and carpets. Anderson suffered from a long history of back problems. He got in and out of vehicles 20 to 30 times a day, and on one occasion he injured his lower back.

The court distinguished *Anderson* from *Martin* and *Boeckmann*, finding that Anderson's injury followed not only from his personal degenerative conditions but from a hazard of his employment, *i.e.*, the requirement that he constantly enter and exit vehicles. The court found the fact that Anderson's back problems could be aggravated by everyday activities was not controlling.[16]

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[17]

The court determined that Anderson's injury resulted from the combination of his preexisting personal degenerative conditions and a work-related hazard.[18]

Although walking, climbing stairs, lifting, and carrying can be described as normal activities of day-to-day living, K.S.A. 2005 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. The intent of this statute is to avoid paying workers compensation benefits for conditions that result from risks that are solely personal to the worker.[19] Although this case presents a close question, and the Board acknowledges the record contains medical opinions going both

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[14] *Boeckmann*, 210 Kan. at 739.

[15] See, *e.g.*, *Richey v. Kansas Golf Assn., Inc.*, Docket No. 1,000,992, 2002 WL 1838714 (WCAB July 24, 2002); *Anthony v. PSI Group, Inc.*, Docket Nos. 265,870 and 265,871, 2001 WL 1399482 (WCAB Oct. 26, 2001); *McConnell v. Farmland Industries, Inc.*, Docket No. 227,052, 1997 WL 802920 (WCAB Dec. 31, 1997); *Munoz v. Frito-Lay, Inc.*, Docket No. 183,437, 1994 WL 749270, (WCAB Apr. 18, 1994).

[16] *Anderson*, 31 Kan. App. 2d at 11.

[17] *Id.* (quoting *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001 [1992]).

[18] *Id.* at 12.

[19] *Boeckmann*, 210 Kan. 733;*Hensley,* 226 Kan. 256*; Anderson*, 31 Kan. App. 2d 5; *Martin*, 5 Kan. App. 2d 298.

ways on the issue, the Board finds that claimant has, so far, failed to prove that if he had not been employed as he was with respondent, he would not be equally injured.[20] In other words, the record compiled to date does not establish that claimant's work activities increased his risk of injury or otherwise contributed to his present condition to a greater degree than if he had not been so employed. The greater weight of the expert medical opinion testimony fails to establish that claimant's work activities aggravated and accelerated his degenerative arthritis beyond that caused by the natural aging process and his normal activities of day-to-day living. The Board finds this case to be closer to *Boeckmann* than to *Anderson*. As such, claimant has failed to prove that his injuries arose out of his employment with respondent.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[21]

WHEREFORE, the Order for Compensation of Administrative Law Judge Brad E. Avery dated July 24, 2006, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

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BOARD MEMBER

c: Mark W. Works, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[20] See *Anderson*, 31 Kan. App. 2d at 11.

[21] K.S.A. 44-534a(a)(2).